

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

JUNCTION CITY REDEVELOPMENT  
GROUP,

Appellant,

v.

SIERRA PACIFIC INDUSTRIES,  
And DEPARTMENT OF ECOLOGY,

Respondents.

PCHB 03-074

ORDER GRANTING STAY

Junction City Redevelopment Group ("Junction City"), a community comprised of low-income persons, the appellant in this case, on May 23, 2003, filed a motion for stay of the Department of Ecology's ("Ecology") issuance of a National Pollutant Discharge Elimination System ("NPDES") permit to Sierra Pacific Industries ("Sierra Pacific"). Sierra Pacific is building a new facility to mill timber. The sawmill will not discharge wastewater, but will recycle this wastewater through the plant process. Sanitary sewer water will be discharged to the City of Aberdeen sewer system. Sierra Pacific also has built a cogeneration facility, which will burn wood waste to generate steam to supply power to the mill and provide electrical power for sale. This process will generate wastewater, which would eventually be discharged to the Grays Harbor estuary. Junction City is asking for a stay of the NPDES permit authorizing the discharge from the cogeneration facility.

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1 The Pollution Control Hearings Board (“Board”), comprised of William H. Lynch,  
2 presiding; Kaleen Cottingham and Robert V. Jensen reviewed the pleadings and attachments  
3 filed by the parties. In addition they heard oral argument in their hearing room in Lacey  
4 Washington, on June 26, 2003.

5 Richard A. Smith, of Smith & Lowney, represents Junction City. David Dabroski, of  
6 Perkins Coie, represents Sierra Pacific. Ronald L. Lavigne, Assistant Attorney General,  
7 represents Ecology. Randi Hamilton, of Gene Barker & Associates, recorded the proceeding.

8 The parties filed the following pleadings with the Board:

- 9 1. Notice of Appeal;
- 10 2. Motion for Stay, including exhibits A through E;
- 11 3. Declaration of Davida Finger;
- 12 4. Proposed Order;
- 13 5. Sierra Pacific Industries’ Opposition to Motion for Stay, including Declaration of  
14 Marie Garrett, with attached exhibits A through D, and Declaration of David B.  
Hericks, with attached exhibits A;
- 15 6. Reply Supporting Motion for Stay, including Declaration of Richard A. Smith with  
16 attached exhibits 1 through 4;
- 17 7. Stipulation and Order;
- 18 8. Letter, dated July 1, 2003, from David Dabroski, with attached Hydraulic Project  
Approval from Department of Fish and Wildlife; and
- 19 9. Letter, dated July 1, 2003, from Richard A. Smith.

## 20 DISCUSSION

1 Junction City requests a stay of Ecology's issuance of the NPDES permit to Sierra Pacific  
2 on several grounds. The Board concludes Junction City has made a prima facie case of  
3 likelihood of success on the merits on its argument Ecology never conducted a study of the all  
4 known, available and reasonable technology ("AKART") to be applied to the temperature of the  
5 proposed waste discharge into the Grays Harbor estuary. This conclusion also establishes a  
6 likelihood of success on the proposed mixing zone, because AKART is a condition precedent to  
7 the establishment of such a zone for a discharge. The Board concludes neither Ecology nor  
8 Sierra Pacific has demonstrated either a substantial likelihood of success on this issue, or a  
9 likelihood of success and an overriding public interest justifying denial of the stay. Therefore the  
10 Board issues a stay pending the hearing. Because of this disposition, we conclude it is  
11 unnecessary and premature to reach the other arguments made by Junction City on behalf of the  
12 stay. Those issues are reserved for the hearing.

## 13 I

14 The water quality standard for temperature for the inner Grays Harbor, a Class B  
15 receiving water, is 19° Celsius. Nineteen degrees Celsius is equivalent to 66.2° Fahrenheit. The  
16 proposed outfall for Sierra Pacific's cogeneration plant would be located two miles below where  
17 the Chehalis River forms the Grays Harbor estuary. Extending upstream for nearly 60 miles, this  
18 river is classified as a Class A freshwater receiving water. It is listed as impaired for temperature  
19 on the 303(d) list prepared by Ecology. The water quality standard for these waters is 18 °  
20 Celsius.

## 21 II

Anadromous bull trout are listed as threatened under the Endangered Species Act. These fish migrate through the vicinity of the proposed new discharge. Bull trout generally need habitat providing cold water. Water temperature above 15° Celsius (59° Fahrenheit) is believed to limit bull trout distribution. The existing conditions provide sub-optimal habitat and would likely be used only as a migration corridor. The temperatures of Grays Harbor are already naturally in excess of state standards. Additional temperature changes of any magnitude would negatively impact salmonid migration.

### III

The Department of Fish and Wildlife (“DF&W”) issued a Hydraulic Project Approval for installation of the cogeneration outfall on October 10, 2002. The permit required the water coming from the plant to be cooled to below 16° Celsius (60.8° Fahrenheit), prior to being discharged into the receiving waters. The permit further prescribed work below the ordinary high water mark shall occur only between June 15 and September 30 of any given year. The permit required the project to be completed by September 30, 2004. Sierra Pacific did not appeal this permit.

## IV

Ecology issued the NPDES permit for the outfall on April 30, 2003. This permit established a maximum daily effluent limit for temperature from the outfall of 93.2° Fahrenheit (34° Celsius). Ecology granted a mixing zone, which is the maximum allowed under its regulations. The chronic mixing zone would be a 225-foot semicircle centered on the outfall,

1 truncated by a line 200 feet from and parallel to the line of mean lower low water. The acute  
2 mixing zone has a 22.5-foot diameter. The mixing zone size was based on a mixing zone study  
3 done by Sierra Pacific. Sierra Pacific considered various pollutants, including temperature. The  
4 study utilized federal effluent guidelines for the steam electric power generating industry,  
5 prepared by the Environmental Protection Agency. These guidelines are found at 40 CFR § 423.  
6 These guidelines are for the generation of electricity from facilities, in which the generation  
7 “results primarily from a process utilizing fossil-type fuel (coal, oil, or gas) or nuclear fuel in  
8 conjunction with a thermal cycle employing the steam water system as the thermodynamic  
9 medium.” 40 CFR § 423.10.

#### 10 V

11 Ecology must require a discharger to “fully apply AKART prior to being authorized a  
12 mixing zone.” WAC 173-201A-100(2). Ecology contends 40 CFR § 423 satisfies AKART.  
13 Junction City first contends the regulation does not apply to wood-burning facilities. Second,  
14 Junction City contends the regulation contains no reference to temperature. We are not  
15 persuaded 40 CFR § 423 is inapplicable to this facility, merely because it does not directly  
16 address wood-burning facilities; however, we are persuaded the regulation does not discuss  
17 temperature. Therefore it cannot be the basis of an AKART decision on that parameter.

#### 18 VI

19 Ecology’s failure to make any AKART decision regarding temperature is further  
20 demonstrated by the recent offer of Sierra Pacific to reduce the maximum temperature discharge  
21 from the cogeneration facility from 93.2° Fahrenheit to 73° Fahrenheit. Sierra Pacific explains

1 this lowering of the discharge temperature can be achieved by discharging from the cool side, as  
2 opposed to the hot side of the cooling tower.

## 3 VII

4 Sierra Pacific has done further studies, which indicate a discharge of 73° Fahrenheit  
5 would reach a temperature of 60° within 0.1 to 7.6 feet downstream of the discharge point. This  
6 short distance suggests this discharge, in and of itself, may not have a significant impact upon the  
7 environment. However, this proposed discharge would exceed the water quality standards of the  
8 receiving water, absent an AKART study, into a body of water that is already seeing  
9 exceedences of the water quality standards for temperature. These exceedences are deleterious to  
10 bull trout, a threatened species of fish. This would establish a poor precedent for the state's  
11 water quality program. The purpose of the AKART study is to determine whether the discharge  
12 can be avoided or ameliorated. Washington's Water Pollution Control Act declares it the public  
13 policy of this state to "maintain the highest possible standards to insure the purity of all waters of  
14 the state consistent with public health and public enjoyment thereof, the propagation and  
15 protection of wildlife, birds, game, fish and other aquatic life, and the industrial development of  
16 the state." RCW 90.58.010. AKART is an explicit part of this policy statement. *Id.* We are not  
17 making a determination of AKART. We are not being asked to do so in this stay motion.  
18 Moreover, it would be inappropriate for us to do so, where Ecology has not made such a  
19 determination.

## 20 VIII

1 The above temperature information supports Junction City's contention the mixing zone  
2 is oversized, at least as far as temperature is concerned.

3 IX

4 Sierra Pacific plans to recycle its process wastewater through the plant. Sierra Pacific  
5 stated in oral argument the water from the cogeneration facility could also be recycled. In  
6 response to Board questioning, Sierra Pacific indicated the facility had been engineered to be a  
7 closed-loop system, but for operational reasons Sierra Pacific decided not to utilize the facility as  
8 such. There is no indication from the materials before us, Ecology ever considered this  
9 information before issuing the permit. This information would be an important ingredient of an  
10 AKART analysis.

11 X

12 Sierra Pacific argues a stay would harm it. However, it is currently discharging the  
13 effluent from the cogeneration facility to the City of Aberdeen's sewage system. Sierra Pacific  
14 represented at oral argument Aberdeen could discontinue this service at any time. However  
15 there is no evidence before the Board indicating Aberdeen is likely to do so prior to hearing.

16 XI

17 Subsequent to oral argument, Sierra Pacific's attorney submitted a letter to the Board,  
18 asking the Board to recognize a stay would likely make it impossible for Sierra Pacific to  
19 construct the outfall this year. It bases this argument on the previously discussed construction  
20 window allowed under the WDFW HPA, and on its own expectation the City of Aberdeen would  
21 disallow Sierra Pacific to continue its discharge into the City's sewage system beyond this fall.

1 The letter further states this window will be included in a U.S. Army Corps of Engineer's permit,  
2 which is to be issued for this project. Junction City's attorney responded the same day, objecting  
3 to Sierra Pacific's submittal as untimely. In addition, Junction City contends the NPDES permit  
4 is not necessary for Sierra Pacific to construct the outfall. Junction City asserts there is no  
5 information in the record supporting Sierra Pacific's assertion Aberdeen will discontinue  
6 allowing Sierra Pacific's discharge sometime this fall.

7 XII

8 We conclude these materials, even if considered, do not satisfy the threshold to defeat the  
9 stay. Sierra Pacific has failed to establish the requisite facts to support harm to it by the granting  
10 of the stay. We do not actually know whether the City of Aberdeen will refuse to continue to  
11 accept Sierra Pacific's cogeneration waste sometime this fall. Sierra Pacific has failed to submit  
12 any documentation to support this contention. If such documentation existed, Sierra Pacific  
13 would surely have submitted it. Even if such documentation existed, it would suggest Sierra  
14 Pacific's harm is self-inflicted, and therefore not irreparable. *See Vanderhouwen v. Ecology,*  
15 *Order Denying Dismissal and Stay*, at 12, PCHB 94-108, 146 & 231 (1994). The company  
16 started discharging before it obtained and complied with all the necessary permits. For example,  
17 the very HPA permit it cites for support in denial of the stay requires Sierra Pacific to limit the  
18 temperature of its discharge from the outfall to 16 ° Celsius. Sierra Pacific never appealed that  
19 permit, which was issued October 10, 2002.

20 XIII



1 We conclude Junction City has demonstrated a likelihood of success on the merits of the  
2 issue of whether Ecology conducted an AKART study of the temperature discharge from the  
3 cogeneration facility. Neither Ecology nor Sierra Pacific have demonstrated either a substantial  
4 likelihood of success on the merits of this issue, or a likelihood of success coupled with an  
5 overriding public interest in denial of the stay.

6 XIV

7 The governing statute generally requires the Board, after either granting or denying a  
8 stay, to expedite the hearing in the matter. The Board accordingly will set this matter for hearing  
9 on Tuesday, October 14, 2003, at 9:30 a.m., in the Board's hearing room in Lacey, Washington.

10 XV

11 Based on the foregoing analysis, the Board issues the following:

12 ORDER

13 Junction City's motion for a stay of NPDES permit No. WA0041017 to Sierra Pacific is  
14 granted, pending a hearing, which will be held Tuesday, October 14, 2003, beginning at 9:30  
15 a.m., in the Board's hearing room in Lacey, Washington.

16 DONE this 9th day of July 2003.

17 POLLUTION CONTROL HEARINGS BOARD

18 ROBERT V. JENSEN, presiding

19 KALEEN COTTINGHAM, Member

20 (see dissenting opinion)  
WILLIAM H. LYNCH, Member